

EXHIBIT A

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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

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4 NATIONAL ASSOCIATION for the
5 ADVANCEMENT of COLORED PEOPLE,
6 SPRING VALLEY BRANCH, et al.,

7 Plaintiffs,

8 v.

17 Civ. 8943 (CS)

9 EAST RAMAPO CENTRAL SCHOOL
10 DISTRICT, et al.,

11 Defendants.
12 -----x

13 United States Courthouse
14 White Plains, N.Y.
15 March 9, 2018
16 10:30 a.m.

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19 Before: THE HONORABLE CATHY SEIBEL,

20 District Judge
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APPEARANCES

NEW YORK CIVIL LIBERTIES UNION
For Plaintiffs
PERRY GROSSMAN

LATHAM & WATKINS, LLP
Attorneys for Plaintiffs
SERRIN ANDREW TURNER
COREY ANNE CALABRESE
ELIZABETH ANNA PARVIS
JENNIFER J. MATYSTIK

MORGAN, LEWIS & BOCKIUS, LLP
Attorneys for Defendant East Ramapo Central School
RANDALL M. LEVINE
DAVID J. BUTLER

ERIC T. SCHNEIDERMAN
Attorney General for the State of New York
ELYCE MATTHEWS
Assistant Attorney General for the State of New York

1 THE DEPUTY CLERK: In the matter of National
2 Association for the Advancement of Colored People, Spring
3 Valley Branch against The East Ramapo Central School District,
4 et al.

5 Will counsel please note their appearance for the
6 record.

7 MS. CALABRESE: Corey Calabrese from Latham & Watkins
8 for the plaintiffs.

9 MR. TURNER: Good morning, your Honor. Serrin Turner
10 from Latham & Watkins for the plaintiffs.

11 MR. GROSSMAN: Good morning, your Honor. Perry
12 Grossman from the New York Civil Liberties Union for the
13 plaintiffs.

14 MS. MATYSTIK: Good morning, your Honor. Jennifer
15 Matystik for the plaintiffs.

16 MS. PARVIS: And Elizabeth Parvis of Latham & Watkins
17 for the plaintiffs.

18 THE COURT: Good morning to you all. Have a seat.

19 MR. BUTLER: Good morning, your Honor. David Butler,
20 Morgan Lewis, for the defendant District.

21 MR. LEVINE: Good morning, your Honor. Randall
22 Levine from Morgan Lewis for the defendant District.

23 MS. MATTHEWS: Elyce Matthews from the Attorney
24 General's Office for Commissioner Elia. Good morning, your
25 Honor.

1 THE COURT: Good morning to all of you. Have a seat.
2 I've got letters. I've got Mr. Butler's letter of
3 March 1st, and I guess Ms. Salomon wrote to me on March 7th for
4 plaintiffs.

5 The application was to, I guess, not make a motion in
6 limine, but let me know about an intended motion in limine, and
7 the plaintiffs raise the issue that that is not the proper
8 mechanism for deciding the issue that the defendants want me to
9 decide. And I suppose, technically, that's correct, but this
10 is clearly an issue that needs to be tee'd up for purposes of
11 discovery, and, while, technically, this may not have been the
12 way to go about it, I think it makes sense for me to deal with
13 it, because if it were to come up through discovery disputes
14 and Judge McCarthy made the decision, one or the other of you
15 would appeal it to me anyway.

16 So I'm happy to sort of address the overarching issue
17 without having a specific motion in limine in front of me
18 because plaintiffs are right that a motion in limine has to be
19 directed toward something in particular, but the overall issue
20 here, as I see it, is one of relevance.

21 And if I understand the state of play correctly, the
22 plaintiffs are arguing that the evidence they've been seeking
23 essentially relating to how the Board has been running the
24 district goes to the responsiveness factor in Gingles, or in
25 the Senate Report that's quoted in Gingles.

1 Seems to me, here, the responsiveness issue is
2 actually a lot easier than it sometimes is in these cases
3 because you've got a situation where 90 -- I forget exactly the
4 numbers, but something like 99 percent of the private school
5 students are white and a similar percentage, maybe it's 95 or
6 96 percent, of the public school students are black and
7 Hispanic, and so it's not much of a leap to say that that if
8 the School Board is not responsive to the needs of the kids in
9 the school, that the School Board is not responsive to black
10 and Hispanic voters.

11 So why, Mr. Butler, wouldn't it be relevant for the
12 plaintiff to show that the Board is not responsive to the
13 parents of public school kids who want good public schools and,
14 instead, is responsive to other people who want lower taxes or
15 other things that benefit their families and not public school
16 families? Or Mr. Levine.

17 MR. LEVINE: Well, I mean, I think it's very
18 important to just understand what the Senate factor is
19 referring to when it talks about responsiveness. And what the
20 Senate factor describes is a particularized inquiry dealing
21 with discrete requests or discrete needs of particular members
22 of a minority group. It is not referring to broad, generalized
23 disputes over public policy where there are legitimate views on
24 both sides of what tax rates should be or what education
25 policies should be. That's not what the Court is asked to

1 decide because it has no connection with elections or voting or
2 anything that's relevant under the Voting Rights Act.

3 That's not say to say responsiveness, as a general
4 matter, is never relevant to any case under the Voting Rights
5 Act, but the Senate Report itself says that it's only in some
6 cases when it may have some limited probative value, and that's
7 really --

8 THE COURT: Why isn't this one of those cases?

9 MR. LEVINE: Well, because those cases are cases
10 almost always where the plaintiffs are alleging intentional
11 discrimination. And the way they want to prove intentional
12 discrimination is that these same government officials that are
13 not responding to their requests for, you know, garbage pickup
14 in the minority neighborhoods are the ones who are in control
15 of how the elections are run. And so that's where that factor
16 comes into play, and it's where it came into play historically.

17 The Senate Report itself says this is not an
18 essential factor, it's not probative in most cases. And, here,
19 the plaintiffs don't make any effort to connect it in any way
20 to actual things that are relevant under the Voting Rights Act.
21 It does not show in any way and they haven't articulated any
22 reason why it shows that minorities are not -- are excluded
23 from the political participation in the district on account of
24 race. Their disagreement with --

25 THE COURT: Well, it shows that the people who got

1 elected don't care about the opinions of these voters. Isn't
2 that a relevant factor?

3 If you're on the school board and there's block
4 voting, as the plaintiffs have to show, and the white people
5 are voting to give benefits to private schools and to keep
6 taxes down and to decimate the public schools -- let's say they
7 can prove that -- doesn't that show that the people on the
8 school board don't care about the votes of the minority
9 families and that, therefore, the people who are elected are
10 responsive only to the white voters? Isn't that something
11 that's helpful to their case?

12 MR. LEVINE: Well, so I think it's useful to break
13 that up a little bit because there's a lot going on in there,
14 for one thing, right?

15 What you're describing is an inherent consequence of
16 any system of electoral politics, right? Where the people who
17 get elected are going to have policies that they're going to
18 pursue because that's what they were elected to do, and the
19 fact that they don't do the things that the other people who
20 lost the election want them to do, that can't be what
21 responsiveness means because that's a consequence of every
22 single election. It's not like, you know, I get to bring a
23 Voting Rights Act claim because I don't like the things that
24 Donald trump is doing. Right? That's not the way that works,
25 right?

1 THE COURT: Well, it certainly wouldn't be enough,
2 but is it completely irrelevant that the way the elections work
3 in this municipality is that a large portion of the public,
4 specifically the constituents in the schools, are unrepresented
5 in the schools?

6 You know, we're not talking about a legislator in
7 Congress here. We're talking about people who are elected to
8 run the schools, which are essentially black and Hispanic
9 schools, and a situation where the votes of black and Hispanic
10 people are irrelevant. Maybe. If they can show it.

11 And I think some of the cases you quote, or
12 Mr. Butler quoted in his letter, including Martinez, on
13 responsiveness are not really relevant because they're talking
14 about Congress, and Congress is really different in terms of
15 responsiveness. When you're talking about the local level on
16 the street, you know, the responsiveness means something a lot
17 more concrete than just, you know, I think NAFTA is or is not
18 good or bad. It's talking about the services that you're
19 getting on a day-to-day basis.

20 MR. LEVINE: In some ways, yes; in some ways, no.
21 You're absolutely right about that. And a school board is
22 actually an interesting case because it's a hybrid in some
23 ways, right? But it can't be the case that politicians who are
24 elected on a platform of maintaining property tax rates can be
25 accused of not being responsive to minority voters because the

1 minority voters wanted them to increase taxes instead. Right?
2 What would be the point of elections if that was a Voting
3 Rights Act violation? That's not what responsiveness means.

4 It is also not what they're trying to show for
5 purposes of responsiveness. When you look at the evidence that
6 they want to put in, there is no rational limitation whatsoever
7 to an effort to show that this particular school board is just
8 not listening and doesn't care about minority voters. They
9 want to put on evidence of everything. They want to try
10 everything that was in the Montesa case. They want to try
11 electives. They want to try transportation funding. They want
12 to try everything. I mean, they want to try special education.
13 There's nothing I can think of that would not come in under
14 their view of what responsiveness is, and that just can't be
15 right. There's no cases out there that have ever done anything
16 like that. Right?

17 Sometimes you will see an analysis of responsiveness
18 in a case, even a case involving a school board. In fact, the
19 Ferguson case that was recently decided is a pretty good
20 example because, there, the plaintiffs made a few very, very
21 discrete showings of what they characterized as a lack of
22 responsiveness by the school board, things that individual
23 members of the minority group asked for, wanted and won't
24 addressed, but that opened it up for the school board to come
25 back and say, well, you know, there are other times when we did

1 respond to it, and it ended up making the factor a wash, and it
2 ended up being irrelevant at the end of the day.

3 THE COURT: Well, I don't know what they plan to
4 prove. Right now, they're just asking for discovery.
5 Obviously, at the PI hearing, we're going to have to have some
6 limitations, but, ultimately, if they want to prove up that the
7 defendants are looting the school budget to the benefit of the
8 white community and to the detriment of the black and the
9 Hispanic community, I don't see why they wouldn't --

10 MR. LEVINE: There would be no nexus whatsoever with
11 any of the elements of a Voting Rights Act claim. That's not a
12 Voting Rights Act claim.

13 THE COURT: Well, responsiveness is one of them. And
14 they're saying, oh, if what the plaintiffs allege is true and
15 the school board is saying, gee, we would love to give you
16 electives, we would love to give you music and art, we would
17 love to give you sports, but we just have no money, and it
18 turns out there is money, but it's being syphoned into places
19 where it doesn't belong, that suggests a lack of
20 responsiveness.

21 MR. LEVINE: But it does not suggest anything about
22 the electoral system that's being challenged.

23 THE COURT: Well, it suggests that the --

24 MR. LEVINE: The power of the votes is --

25 THE COURT: It suggests that the way the system is

1 set up, it permits the votes of the families who are in the
2 schools to be essentially irrelevant.

3 MR. LEVINE: The Court does not need to decide any of
4 those things to conclude one way or another whether or not the
5 Voting Rights Act has been violated. And, in fact, it will not
6 help you decide one way or another whether the Voting Rights
7 Act has been violated, because even if you find exactly what
8 you just described, even if you find that they've been
9 siphoning money out of the school district, as plaintiffs like
10 these have been alleging for years and never been able to prove
11 despite all their efforts, even if you find that, it will not
12 show a Voting Rights Act violation. It simply doesn't move the
13 ball forward because there are specific things that need to be
14 found to show a Voting Rights Act violation. There are
15 elements of a claim that are different from the allegations
16 that were made in the Montesa case. They're completely
17 distinct.

18 THE COURT: Look, I recognize this case is completely
19 distinct in many respects, which is why maybe it poses a bigger
20 challenge to the defendants than the last time around. But let
21 me ask the plaintiffs.

22 You know, Mr. Levine says responsiveness doesn't mean
23 that the policies the losing party prefers aren't getting
24 implemented. That always is the case. And in every town, in
25 every school board election, there are people who want lower

1 taxes versus the people who want better schools, and whoever
2 wins gets their way. So why is it relevant that, here, like in
3 any other election, the people who lost aren't getting their
4 way?

5 MR. GROSSMAN: So, your Honor, I can connect this to
6 the Voting Rights Act, and I believe the Gingles case does and
7 other cases in which school boards have litigated do as well.
8 The fact is when you have, as you identified, racial block
9 voting and you have private schools that are white and public
10 schools that are minority, the minority voters have a
11 particularized need for services to the public schools. This
12 is not going to exist in every school district. There is not
13 necessarily racial block voting in every single school
14 district. Not every issue is going to be won where there are
15 particularized needs of a minority community, but where, as you
16 identified, you have a clear racial demarcation between two
17 sets of schools, the fact that the school board is making
18 judgments that favor white schools over minority schools is
19 going to show that, whatever the wisdom of the Board's
20 judgments, it is not electorally accountable to those minority
21 voters and can effectively ignore what it is they want.

22 THE COURT: But how do I know if the reason they're
23 not accountable is because there's just more white voters or
24 the white voters are more organized or the lower tax people are
25 more passionate or because there's some violation going on?

1 MR. GROSSMAN: So that is to say that, one, the
2 districts, of course, are able to put in evidence of
3 responsiveness in order to rebut evidence of unresponsiveness.
4 But it's part of the totality of the circumstances that exist,
5 right? The primary and weightiest factors in the Voting Rights
6 Act inquiry are the Gingles factors and the existence of
7 racially polarized voting. What the responsiveness inquiry and
8 other parts of the Senate factors show is what are the
9 consequences for minority voters in terms of that racial block
10 voting.

11 So, here, and in other similar cases, where there are
12 particularized needs of the minority community that the board
13 is not responding to, whether they are individualized inquiries
14 of the kind Mr. Levine suggested might be relevant or broader
15 sort of policy issues where there are, as you suggested, the
16 Board is looting the public schools in order to pay for private
17 schools, it just shows that there is a lack of any sense of --
18 that the at-large system makes these elected officials so
19 secure as to make any appeal to these minority interests
20 unnecessary. If they want to rebut that, they can, but it
21 certainly is relevant to show that minority voters don't have
22 sway here.

23 And what we've alleged is that, in an at-large
24 system, white block voting can always out-vote minority block
25 voting, and so they have, effectively, nine -- a veto over

1 every seat on the board. And when you look at the potential
2 consequences of a Voting Rights Act violation and an award
3 system were implemented, then you might see minority preferred
4 legislators elected from those districts who can at least
5 represent the interests of the minority community and add some
6 input in order to make sure that those policy decisions are
7 made in the way that do favor sort of political interests as
8 opposed to simply a lack of responsiveness to the needs of the
9 minority community.

10 MR. LEVINE: Let's assume for a second that maybe
11 there is some shred of relevance to actual patterns of voting
12 and whether the electoral system that's in place has a
13 discriminatory effect. There have to be some practical
14 considerations made here. And so if we take it out of the 402
15 world and put it into the 403 world, they are going to put on
16 almost their entire case on a factor that the Senate Report
17 itself says is not essential and has little probative value.
18 Every court that looks at it says it has little probative
19 value. They're going to impose enormous burdens on the Court
20 and on the District and on the State to rebut this evidence.

21 THE COURT: Where does the Senate Report say it's of
22 little probative value?

23 MR. LEVINE: The Senate Report says --

24 THE COURT: I thought it said responsiveness doesn't
25 have much probative value, but unresponsiveness does.

1 MR. LEVINE: Well, what it says is additional factors
2 in some cases have had probative value, such as whether there
3 is a significant lack of responsiveness. So it's already
4 acknowledging that, only in some cases, but not in all, is it
5 going to have any probative value. And then it says
6 unresponsiveness is not an essential part of plaintiff's case.

7 THE COURT: True. That means plaintiffs can win
8 without proving it, but it doesn't mean that it doesn't help
9 them win if they do prove it.

10 MR. LEVINE: Well, right, but it also means that even
11 if they do prove it, even if we stipulate, okay, fine, fine,
12 nonresponsive, fine, you win, they still lose this case.

13 THE COURT: Maybe so. And maybe you want to
14 stipulate to it because maybe the discovery is so burdensome
15 and the facts so obvious that you want to stipulate to it. I
16 don't know.

17 But I do think it is fair to say, in the unique
18 situation we have here, where, essentially, the public schools
19 are minority and the private schools are white and that it is
20 fair to say the Board's responsiveness to public school needs
21 is synonymous with its responsiveness to minority needs and it
22 seems like, based on what I know about this community -- and
23 I've never seen evidence; I've only seen allegations -- but it
24 does seem like there are a bunch of things going on that
25 suggest that the members of the Board have no concern about

1 the -- at least some of them -- about losing the votes of the
2 public school families. I don't think that that's going to
3 drive a decision either way, but I don't think it's irrelevant,
4 either. I mean, the Supreme Court said it's a factor in some
5 cases, and I can't tell you ahead of time whether it is or
6 isn't in this case. I can tell you it sounds like it is. And
7 this is a very -- no pun intended -- black-and-white situation
8 where this case lacks some of the complications you see in
9 other cases because, here, the schools are black and
10 Hispanic -- the public schools are black and Hispanic and the
11 private schools are white and the white people are voting for
12 Board members who are not prioritizing public education. If
13 they can show that.

14 So it seems -- I'm reaching no conclusions at all
15 about what effect any such evidence might have, but I'm
16 certainly not in a position now to say that I can tell that
17 it's not going to be relevant. So I think it is a proper
18 subject for discovery. The extent to which what plaintiffs are
19 asking for is proportional and reasonable and all that I will
20 leave to Judge McCarthy. I do think that some of the things
21 that plaintiffs have asked for are more targeted than others.
22 For example, things like staffing levels, class sizes, extra
23 curricular, academic offerings, all that seems more relevant to
24 me than things like what contractors are chosen.

25 MR. LEVINE: I'm sorry, your Honor. Staffing levels

1 in the public schools are relevant to whether the election
2 system violates the Voting Rights Act?

3 THE COURT: Yes. Because if the black and Hispanic
4 kids are in classes of 40 because they won't hire enough
5 teachers, that goes to responsiveness.

6 MR. LEVINE: Well, to use your own words, maybe it's
7 a crummy school district, but what does that have to do with
8 the Voting Rights Act?

9 THE COURT: But, you know, you quoted a sliver of
10 that argument, at the end of which I concluded it did have to
11 do with the Voting Rights Act.

12 We are here because you guys wanted all plaintiffs'
13 records of any complaints they made to the school district
14 because it related to responsiveness, and I gave it to you
15 because it relates to responsiveness.

16 MR. LEVINE: Well, not because it related to
17 responsiveness. Right? I mean, that's actually one of the
18 interesting sort of problems we have here.

19 THE COURT: You know, you're in this district and
20 you're complaining to the Board my kid's been in school for 14
21 years now and can't graduate because there's not enough Regents
22 math classes and he has to take four study halls a day because
23 there aren't enough teachers and there aren't enough offerings,
24 and my kid wants to go to college and can't go to college, and
25 whether the Board responds to that sounds to me like it's

1 relevant to responsiveness. So that's why I required them to
2 give you all that stuff.

3 MR. LEVINE: So what does respond mean in that
4 context? Are you saying that they do what the person is asking
5 them to do regardless of anything else or what? I mean, if
6 that's the thing, I don't understand.

7 THE COURT: If they can show a pattern over time of
8 the Board not giving a darn about the concerns of the minority
9 voters, that's one of the factors under the test. I don't know
10 if it's going to have any ultimate effect or not, but it
11 certainly is something the Supreme Court said can be relevant.
12 I see absolutely no basis at this point to say that this is one
13 of the cases where it's not relevant. Like I said, certain
14 things seem more on point than others. Selection of
15 contractors, I'm not sure how that relates to responsiveness at
16 all, unless there's some scheme to overpay contractors or
17 something like that, to loot the schools. I don't know.

18 I'm going to leave it to Judge McCarthy to decide
19 what is or is not reasonable and proportionate under the
20 discovery rules, but I am saying that the extent to which the
21 School Board responds to the concerns of the public school
22 parents, which is the same as the minority parents, at this
23 stage, is relevant. Whether it ultimately carries the day, I
24 don't know.

25 And I certainly am not going to tell you how to do

1 your job, but it may be the kind of thing where it makes sense
2 to stipulate to it. Maybe the Board is of the view that it's
3 their obligation to disregard the wishes of the people who
4 didn't vote for them and they will have no hesitation in
5 saying, yeah, we're not responsive to the people who didn't
6 vote for us, we're responsive to the people who voted for us,
7 and then you take that out of the hearing, but that's not my
8 issue.

9 Anything else you --

10 MR. LEVINE: Would that take the issue out of the
11 hearing?

12 THE COURT: If you stipulated to one of the factors,
13 I would imagine. You could stipulate to any of the factors. I
14 don't remember what they all are, but I think there was one --
15 at one of our first meetings, there was talk that you might
16 stipulate to one of the factors. Maybe it was the compactness.

17 MR. LEVINE: Right. The first of the Gingles
18 preconditions, sure, right.

19 THE COURT: I mean, it's a PI hearing, so -- there is
20 case law to the effect that when you have a jury trial and
21 you're asking the jury to pull the trigger on something, the
22 defendant can't stipulate out facts that might make it morally
23 easier for the jury to pull the trigger. So, for example -- I
24 can't remember. The case is called Old Chief. I think it had
25 to do with a prior conviction being some sort of element of an

1 offense -- I could be wrong about that -- but the defendant
2 wanted to stipulate to it so that the jury wouldn't hear about
3 it, and the Court said, no, the jury -- and the government
4 wouldn't let the jury not hear about it, and the Supreme Court
5 said, no, the government's allowed to insist that the jury hear
6 about it because you're asking a jury to do something difficult
7 and that has a moral dimension and they should be able to hear
8 all the facts that relate to what they're being asked to do.

9 So there are some defense stipulations, at least in
10 the jury context, that don't take the issue out of the case. A
11 PI hearing in front of me, different, I think. If you said you
12 were willing to stipulate to lack of responsiveness and they
13 wanted to prove up lack of responsiveness, I might say, no, you
14 know, you got that, but how you stipulate to it and all that --

15 MR. LEVINE: Well, that's important to know the
16 Court's views on that. Right? Because how much do you really
17 want to hear about every budget cut for the last decade? How
18 much do you want to hear about all the reasons why a whole slew
19 of people are unhappy with the way the school district has been
20 run? How much does that really influence the way that you're
21 going to decide this case?

22 THE COURT: How do I know until I hear all the other
23 evidence? I don't know. But maybe you want to stipulate that,
24 15 years ago, the budget was X and now it's Y; 15 years ago,
25 class size was 22 and now it's 40; 15 years ago, there were AP

1 classes and now there aren't; 15 years ago, there were sports
2 and now there aren't. I don't know. I mean, that sort of
3 thing seems like it would save a lot of --

4 MR. LEVINE: Right. That's kind of what I'm talking
5 about. Right? Those are all objective facts. They're not
6 going to be disputed. They don't need to make a showing on
7 that. The only reason they want to make showing on it -- I'm
8 not even sure, actually, why they want to make a showing of it
9 other than that, you know, the parents of the public school
10 kids would have preferred if there hadn't been budget cuts.
11 Well, that's also hard to dispute. It's just not relevant to
12 this analysis.

13 THE COURT: Yes, but there is an argument that what
14 we have here is more than just budget cuts and we're going to
15 save money by removing some of the bells and whistles.

16 You know, where I live, the bells and whistles are
17 there's three kids who want to swim after school and we're
18 going to pay for a bus to take them to a neighboring town where
19 there is a pool. That's the sort of thing that gets cut when
20 there's tax cuts. Here, we're talking about very basic
21 educational services. That's what they're alleging. They're
22 not talking about luxuries being cut and bells and whistles
23 being cut. They're talking about a school district that, at
24 least according to the State, is giving a really substandard
25 basic education.

1 MR. LEVINE: Well, again, that gets to the point,
2 then, right? Because, as you said, you can look at a budget
3 from one year and look at a budget from the next year.
4 Objective facts. Right? There's less money in the budget.
5 There's things that are cut. Fine. Right? They can do that
6 if they want. But the last point that you just made about the
7 substandard education, that actually is turning this case into
8 something else, and that's actually requiring you to decide
9 something completely different that has nothing to do with the
10 Voting Rights Act and is requiring you to make sort of
11 subjective policy judgments about whether they're doing what
12 they're supposed to do in terms of providing an education.

13 THE COURT: I just think that if the cuts are so deep
14 that they affect -- effectively result in a substandard
15 education, that is relevant to responsiveness much more so than
16 it would be if, oh, the three kids who want to swim have to
17 carpool now instead of taking the bus.

18 MR. LEVINE: So I disagree with that, actually,
19 because it would be the reasons why the budget cuts were made,
20 and that's the part that's hard to prove and that requires a
21 showing from both sides that actually is going to take up a ton
22 of time and energy and resources, because the reasons why are
23 what's important. If the fact of the budget cuts is something
24 that they want to put in, well, there's no dispute. The facts
25 are the facts. The documents are the documents. But if the

1 underlying reasons why is something that you're going to
2 decide, oh, they didn't have to cut the budget, but they did
3 anyway --

4 THE COURT: I'm not going to revisit could they have
5 done a different budget.

6 MR. LEVINE: Well, but that's what they're asking.
7 They want you to decide that the School Board made bad
8 decisions, made the wrong --

9 THE COURT: No. They want me to --

10 MR. LEVINE: -- policy decisions.

11 THE COURT: They want me to decide that what the
12 School Board did showed that it didn't care about the votes of
13 the minority members of the community. That's, I think, what
14 they want me to decide. If the way they want to show it -- if
15 one of the ways they want to show that is class sizes went from
16 20 to 40 and course offerings went from plentiful to
17 insufficient, that seems to be a reasonable way to do it.

18 But what I would do if I were the plaintiffs, since
19 these things probably, in many respects, are not disputed -- I
20 mean, nobody's going to say -- if there used to be AP classes
21 and now there aren't, that's a knowable fact. If that's the
22 sort of thing you want to prove up, they used to have AP
23 classes and now they don't; they used to have 22 kids per class
24 and now it's 42; they used to have music and art and now they
25 don't; they used to have full-day kindergarten and now they

1 don't; they used to have sports and now they don't. Make a
2 wish list. Maybe they'll stipulate to a lot of it because
3 either it's true or not

4 MR. LEVINE: Right, but then the question is so what,
5 right?

6 THE COURT: And that has to await the hearing. It
7 may turn out that it doesn't even make it into the calculus,
8 but I can't say now that I know for sure it doesn't.

9 MR. LEVINE: Well, there are certain factors that we
10 do know for sure are going to be important. We do know for
11 sure that they cannot win their case -- they cannot win this
12 motion for preliminary injunction because they can't show a
13 likelihood of success on the merits and if they don't satisfy
14 the last two Gingles preconditions and if they don't actually
15 meet the two most important of the Senate factors, which are to
16 the extent to which the minority group members have been
17 elected to office and the extent to which voting is racially
18 polarized. We could have a preliminary injunction hearing
19 focused on just those absolutely essential things that
20 determine whether or not they have a likelihood of success on
21 the merits without imposing on the parties this incredible
22 burden to prove up the reasons behind policy decisions for the
23 last ten years that the Board has been making, and that would
24 be more than sufficient to resolve the motion for preliminary
25 injunction, because if they don't have those, they lose. And

1 even if they do have responsiveness, it says nothing one way or
2 another about whether they win or lose.

3 THE COURT: I'm all for narrowing the hearing. And
4 if you want to agree that if they prove those two, they get
5 their PI and if they don't, they don't, that's great. That
6 makes life a lot easier for everybody. If you're willing to
7 take the position that they just have to prove those two
8 preconditions and then they get their PI, I can't imagine why I
9 would let them put in evidence on any other issues. For
10 purposes of the PI. Obviously, the case goes on.

11 MR. LEVINE: That's not a position I'm taking. I
12 mean, the Gingles Court says, it says that these two factors,
13 the extent to which minority group members have been elected to
14 office and the extent to which voting is racially polarized,
15 those are the factors. All of the other factors are just
16 supportive, right?

17 THE COURT: Okay, but I'm going to let them support,
18 if they can. I can't say to them, in the absence of an
19 agreement between the parties, that you can't prove up what the
20 Supreme Court says is relevant.

21 MR. LEVINE: But wouldn't it make sense on a
22 preliminary record for a preliminary injunction to limit it to
23 just the things that they absolutely have to prove to win? And
24 if it turns out they need to prove other stuff to get over the
25 hump, well, that's what litigation is about. We can do regular

1 discovery according to an ordinary schedule and they can prove
2 it up.

3 THE COURT: If you're okay with they just have to
4 prove those preconditions and, therefore, they win and the
5 other things we've been talking about aren't relevant to those
6 preconditions, then -- I mean, you guys should have a
7 conversation. Maybe we can narrow it.

8 Look, we've got a two-week hearing, so that's going
9 to narrow what people can do. And I think the parties should
10 negotiate on how much time each side is going to use of that
11 two weeks. We're not going to try the whole case and we're not
12 going to try the history of everything that's ever happened in
13 the East Ramapo School District. Obviously, there are limits,
14 because there are limits to what discovery you can get done
15 between now and April 12th.

16 MR. LEVINE: Right. That's exactly why we brought
17 this motion, your Honor. That's exactly what we're trying to
18 accomplish with this, because, right now, the discovery that
19 they're seeking and the case that they want to make absolutely
20 goes to the entire history of everything that's ever happened
21 in the school district.

22 THE COURT: Well, that's why you'll have Judge
23 McCarthy to draw some lines, but the one line that's not going
24 to be drawn is this stuff is irrelevant. It's not irrelevant.
25 You might be able to make it irrelevant through an agreement.

1 God bless. I would be all for that. But the fact that they
2 might be able to prove their case without this or, even with
3 this, they might not, doesn't make it irrelevant. I can't tell
4 that yet. I can't tell whether this is going to help them make
5 their case or whether they could make their case without it.
6 So it seems relevant to me.

7 You might want to -- you've made two -- I don't know
8 if you intended it as a suggestion or an offer, but you made
9 two what I think are very practical propositions. One is
10 stipulating to the facts that the plaintiffs want to prove up
11 under the responsiveness rubric, or at least a bunch of them,
12 or stipulating that all they have to prove is A and B and then
13 they win. Now, I don't know if all they have to -- or,
14 actually, maybe it's B and C of the three main factors. But I
15 don't know that the latter stipulation would make this sort of
16 evidence irrelevant or not. That's between you guys.

17 MR. LEVINE: Well, now, just suppose, hypothetically,
18 plaintiffs are not willing to do that and plaintiffs are not
19 willing to agree to anything that prevents them from showing
20 all of the things they want to show about how bad the school
21 district is and how much they disagree with all of these
22 decisions that were made and how they think they were immoral,
23 because that's what this case is really about. It's got
24 nothing to do with elections or voting, and, unfortunately,
25 we're not able to get there.

1 THE COURT: They're not going to win if they don't
2 prove up what the Supreme Court says they have to prove up
3 about elections and voting.

4 And if you guys can't agree, I'm going to come up
5 with a number. I'm going to say you have -- totally making
6 this up -- 25 hours. What they do with it is their problem and
7 what you do with yours is yours. As I said, totally making
8 those numbers up. So you guys should add that issue to your
9 long list of things you're negotiating or fighting about.

10 And both sides are going to have to make decisions
11 about what evidence they think is most important, but I think
12 some reasonable targeted stipulations could save both sides a
13 lot of heartburn, because if a stipulation saves them from
14 having to prove something up and it saves you from having to
15 produce discovery, seems like it's all good. Or at least for
16 now. If you can't get to yes, fine. Everybody will just prove
17 their case the old-fashioned way.

18 So I leave you to the capable hands of Magistrate
19 McCarthy.

20 Anything else we should do this morning?

21 All right. See you soon.

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